Filed 8/10/09 Jensen Trucking Service v. Bulk or Liquid Transport CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JENSEN TRUCKING SERVICE, INC., Plaintiff and Appellant, v. BULK OR LIQUID TRANSPORT et al., Defendants and Respondents.	2d Civil No. B206375 (Super. Ct. No. CV060772) (San Luis Obispo County)

Plaintiff Jensen Trucking Service, Inc. (Jensen) appeals a judgment in favor of defendants Bulk or Liquid Transport (BOLT) and Mike Thomas and Tracy Thomas. Jensen sued defendants for breach of the duty of loyalty and intentional interference with business relations. We conclude, among other things: substantial evidence supports the verdicts; defense counsel's conduct at trial does not warrant reversal; the trial court did not err in denying Jensen's motion for a new trial; Jensen has not shown jury misconduct; and the verdict form concerning whether Tracy Thomas was a Jensen managing agent was proper. We affirm.

FACTS

Mike and Tracy Thomas were husband and wife and they worked for Jensen. Jensen is a trucking company which hauls liquid sweeteners for food producers such as Cargill, Amalgamated Sugar and ADM. Jensen had a contract with ADM to transport products at a distribution facility in Phoenix, Arizona. Mike was a Jensen

director and corporate officer. Tracy was an office manager who signed company checks. She had no authority to hire or fire employees and she worked under Mike's direction.

The Thomases worked for Jensen for many years, but they wanted to start their own trucking business. They formed a company called BOLT and eventually quit their jobs at Jensen.

ADM distributes liquid sweeteners across the country and makes contracts with various trucking companies to distribute its products. Jeffrey Kuznia, an ADM contract negotiator, testified that the Thomases told him that "they were going to go in the trucking business on their own and . . . were interested . . . in hauling for ADM." Kuznia said that when ADM decides to change trucking companies, it prepares a "contract package" for the new carrier, but ADM decides where that company will perform the transportation services. ADM decided to give BOLT the trucking routes for Phoenix and Salt Lake City. Kuznia said the Thomases "were interested in doing business wherever . . . we'd let them do business for us" and they did not request a particular location. The Thomases never suggested to Kuznia that Jensen was not interested in maintaining the Phoenix account. During negotiations with ADM, the Thomases made no unfavorable comments about Jensen, nor did they ever say anything to indicate they had "an intent to shut down" Jensen's business or compete with it.

Kuznia testified that ADM had used Jensen for the Phoenix route, but ADM decided to give that route to BOLT because it had superior equipment and was "a woman minority-owned business." Jensen showed little interest in some of the transportation routes ADM offered. And Jensen wanted burdensome contractual conditions that were unacceptable to ADM. BOLT never demanded such conditions, and ADM never had a problem with BOLT on "any of their runs." Kuznia said that although ADM replaced Jensen on the Phoenix route, it did not sever its business relationship with Jensen. Jensen has a contract with ADM for other transportation routes. Every week ADM receives offers from trucking companies to take over ADM routes. If BOLT does not perform well, ADM has the right to assign the route to another company.

Russ Reimer, an ADM official, testified that by contracting with minority-owned companies such as BOLT, ADM receives financial benefits from its major customers and improves its "ability to sell more product" to them. He said when ADM decided to contract with the Thomases, "we were looking at using them at various marketplaces." The Thomases gave no indication that they were trying to take business away from Jensen. Jensen may compete for the ADM Phoenix route. But it has not made any effort to do so.

Alfred Lee Hobbs, Jensen's president, testified that his company had "completely" relied on Mike Thomas "to take care of Jensen's business operations." The ADM Phoenix account was Jensen's most profitable business account. After losing it, Jensen could not sustain a profit. On cross-examination, Hobbs said Jensen's net worth in 2007 was the same as it was in 2004. Jensen rejected new business offers from other food producers and sustained losses as a result of traffic accidents.

Michael Little, Jensen's accountant, testified that the average annual net income received by Jensen for the ADM Phoenix account was $199,916. He projected that ADM would be a customer for 10 years and Jensen's damages would be $1,473,979. On cross-examination, he said he arrived at his projections without complete audit procedures and the ADM Phoenix account could be terminated by ADM on 30 days' notice.

Mike Thomas testified he never discussed targeting, competing or taking any business away from Jensen in any of the meetings he had with ADM. He met with ADM for the purpose of discussing "our dream to start our own company." He contacted food distribution companies only to tell them, "[we were] going to be going into business" and to see if they were interested.

On the breach of the duty of loyalty cause of action, the jury found: 1) Mike Thomas was a Jensen corporate officer, director or managing agent; 2) Tracy Thomas did not fall within those categories; 3) Mike breached his duty of loyalty to Jensen; 4) Tracy did not breach a duty; and 5) neither Mike's nor Tracy's conduct was a substantial factor in causing harm to Jensen. On the cause of action for intentional

interference with prospective economic relations, the jury found neither Mike nor Tracy intended to disrupt Jensen's economic relationship with ADM.

Motion for a New Trial

Jensen filed a motion for new trial claiming, among other things, jury misconduct. It relied on three juror declarations--one from an alternate, and two from jurors who had voted in the minority in favor of Jensen.

Juror R.G. said, "I heard at least one juror voice the opinion that the Thomases had suffered enough for what they had done because they had been forced to pay for attorneys to defend them. [¶] . . .*Ultimately, nine of the jurors agreed on a compromise* that they would find that Mike Thomas had breached his duty but that they would check 'NO' on the 'substantial factor' question so that they could avoid having to award any damages." (Italics added.)

Juror P.H. said, "A majority of the jury expressed grave concern that losing the case would ruin the Thomases financially. . . . [¶] . . . [¶] . . .*Ultimately, nine of the jurors agreed to compromise* by finding that Mike Thomas was an officer, director or managing agent and had breached his duty but checking 'NO' on the 'substantial factor' question so that they could avoid having to award any damages." (Italics added.)

Alternate juror S.K. said, "I also went into the jury room and observed the deliberations but did not participate in them. [¶] . . . [¶] A number of jurors indicated that they felt bad for the Thomases because they had seen Tracy Thomas cry during the trial and had seen the Thomases' attorney, Mr. Silverstein, get teary during his closing argument. Several jurors talked openly about their feeling that the Thomases were being bullied by a big corporation. . . . [¶] . . . *Nine of the jury therefore ultimately negotiated and decided to compromise* by finding that Mike Thomas had breached his duties but not awarding damages." (Italics added.)

In opposition, the Thomases attached declarations from two of the nine jurors who voted in the majority.

Juror D.D. said, "While discussions occurred relating to how a verdict against the Thomases would hurt them financially, I did not base my decision on that at

all. . . . [¶] . . . I based my verdict for defendants on the fact that I did not believe Plaintiff proved its case . . . . [¶] . . . [¶] . . . Contrary to what these other jurors say, I believe the jury did decide that nothing the Thomases did caused any damage. *I came to that conclusion without any compromise*." (Italics added.)

Juror S.H. said, "I cannot speak for what was in the minds of the other jurors, but I can say right from the start there seemed to be a 9-3 split among the jurors in favor of the Thomases. [¶] . . . There were discussions about the finances of Mike and Tracy Thomas, and how a verdict might affect them. There were other discussions as well. However, *I did not base my decision on feeling sorry* [for] the Thomases other than I did feel sorry that they got sued for something I believed they had a right to do, which is change jobs. [¶] . . . Plaintiff simply did not prove to me that anything the Thomases did was the cause of Plaintiff's damages." (Italics added.)

The trial court denied the motion. It found that "[t]he matters set forth in Jensen's juror affidavits implicate the mental processes of the jurors in reaching a decision. . . . [¶] . . . [¶] On the issue of misconduct, the other juror affidavits call into question some of the 'observations' contained in Jensen's juror affidavits. While laden with certain inadmissible statements, these responding affidavits point out that *the deliberative process was not affected by the statements alleged in the Jensen affidavits*." (Italics added.) The court also said that "the possibility of prejudice stemming from any alleged misconduct is not great, because plaintiff's case was fraught with several fundamental difficulties." It found that Jensen's evidence on damages was weak, there was no prejudice, and any misconduct "would not have materially affected the substantial rights of the plaintiff."

DISCUSSION

I. Jury Misconduct

Jensen contends the jury engaged in misconduct and the trial court erred by denying its motion for new trial. It claims the juror declarations established a presumption of prejudice that was never overcome. We disagree.

Jensen moved for a new trial. "The moving party bears the burden of establishing juror misconduct." (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 625.) "'In determining whether juror misconduct occurred, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence."'" (*Id.* at p. 624.)

"[W]ith narrow exceptions, evidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict." (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) "The jury's impartiality may be challenged by evidence of 'statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly . . . ." (*Ibid.*, italics omitted.) "[B]ut '[n]o evidence is admissible to show the [actual] effect of such statement . . . upon a juror . . . or concerning the mental processes by which [the verdict] was determined.'" (*Ibid.*, italics omitted.)

"A juror's misconduct raises a presumption of prejudice, which is reviewed as a mixed question of law and fact." (*Donovan v. Poway Unified School Dist.*, *supra*, 167 Cal.App.4th at p. 626.) "In making this assessment, we defer to the trial court's findings if supported by substantial evidence, and 'independently determine whether, from the nature of [the juror] misconduct and all the surrounding circumstances, there is a substantial likelihood' that the misconduct was prejudicial . . . ." (*Ibid*.)

A. Agreement to Compromise the Verdict

Jensen claims its three juror declarations showed that the jury "agreed to compromise" the verdict, instead of deciding the case on the evidence. It notes that the jury voted 11-to-1 that Mike Thomas breached his duty of loyalty, and 10-to-2 that Jensen was harmed. It claims it was unusual for the jury to have then voted 9-to-3 that the breach of duty was not a substantial factor in causing harm. Jensen suggests that the jurors' statements of sympathy for the Thomases' financial condition show their motive to vote "no" on the substantial factor issue. But the statements of deliberating jurors may not be used to speculate as to how the jury reached its verdict. (*In re Hamilton*, *supra*, 20 Cal.4th at p. 294.)

There is an exception to this rule. Juror declarations may show that instead of considering the evidence, the jury adopted an improper method or formula to decide the case or agreed to violate their instructions. (*Bardessono v. Michels* (1970) 3 Cal.3d 780, 794; *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1684.) To demonstrate such improper conduct, it was Jensen's "responsibility to present admissible evidence to impeach the verdict." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1046.)

Here the declarations of R.G., P.H. and S.K. essentially make a one sentence conclusory assertion that the jury agreed to compromise the verdict. But this was insufficient. "All affidavits relied upon as probative must state evidentiary facts; they must show facts and circumstances from which the ultimate fact sought to be proved may be deduced by the court." (*Greshko v. County of Los Angeles* (1987) 194 Cal.App.3d 822, 834.) "Affidavits or declarations setting forth only conclusions, opinions or ultimate facts are to be held insufficient . . . ." (*Ibid.*) Here, because of the conclusory language and lack of evidentiary facts, it is unclear whether the three jurors were: 1) expressing their opinion that the majority must have compromised a verdict because a "no" vote on causation was, in their view, incompatible with the majority's votes on the other special verdicts; 2) speculating that the 9-to-3 vote was influenced by statements about the Thomases' financial plight; or 3) asserting that nine jurors actually agreed to violate their duty and ignore the evidence. Jensen claims the jury's conduct fell within the third category. But the declarations failed to state specific evidentiary facts to support that claim. Reliance on ambiguous juror declarations and conclusory assertions is not sufficient to establish juror misconduct. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1046, *English v. Lin* (1994) 26 Cal.App.4th 1358, 1368; *Greshko*, at p. 834.)

But, even if these declarations were not deficient, the result does not change. Here the claim that the jury compromised its verdict was a contested factual issue. The trial court could reasonably infer that Jensen's position was refuted by the declarations of jurors D.D. and S.H. In fact, it made a negative credibility finding about R.G.'s, P.H.'s and S.K.'s declarations when it said D.D.'s and S.H.'s declarations "call into question" their observations. The court said, "[T]hese affidavits do not support a finding

of an express or implied agreement by the jurors to include the consideration of improper matters in their verdict." We defer to the trial court's factual findings based on its credibility determinations of the affiants. (*Donovan v. Poway Unified School Dist.*, *supra*, 167 Cal.App.4th at p. 624.)

B. Consideration of the Thomases' Financial Condition

Jensen's arguments are largely predicated on the assumption that it was misconduct for jurors to mention the Thomases' financial condition. The jury should not consider issues unrelated to the trial. (*Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 682.) But there is "nothing improper in jurors discussing evidence actually presented in the case during its deliberations." (*Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1069.) Here the trial court found that "to the extent there may have been discussion in the jury room about lawyers' fees, or the cost of presenting a defense, it is likely because this issue was brought out as part of the evidence, or in argument, *without any contemporaneous objection or response from plaintiff*."

This finding is supported by the record. Jensen's counsel asked Tracy Thomas how much money BOLT spent on attorney's fees. She said the amount was $129,000. She also testified that during one period BOLT had a net operating loss of $335,131. In closing argument, Jensen's counsel asked the jury to consider the defendants' positive financial position, and said, "[D]on't forget the first year out of the box, they got 1.4" million from one client. The Thomases' counsel responded by telling jurors, "[M]y clients lost $300,000 last year . . . you heard it from the accountant. They were very proud, 'you spent $100,000 on attorneys.' Yes, they did. It wasn't all me." Jensen made no objection to these remarks. Because there was evidence on the Thomases' financial condition that Jensen introduced and mentioned in oral argument, Jensen may not claim the jurors committed misconduct by discussing it. (*Chronakis v. Windsor*, *supra*, 14 Cal.App.4th at p. 1069.)

Moreover, the trial court found, "[E]ven if the information contained in Jensen's juror affidavits were admissible and constituted 'misconduct,' such misconduct could not fairly be considered prejudicial . . . ." It said, "[W]ith respect to damages,

plaintiff's case was fragile," and "the Court was not convinced that plaintiff ever had a reasonable claim . . . that significant financial harm was attributable to the defendants' conduct." "'The trial judge is familiar with the evidence, witnesses and proceedings, and is in the best position to determine whether, in view of all the circumstances, justice demands a retrial.'" (*Bardessono v. Michels, supra,* 3 Cal.3d at p. 795.)

The trial court's finding that Jensen's evidence of damages was "fragile" is supported by the record. Jensen claims it suffered substantial losses as a result of the Thomases' conduct. But Hobbs admitted Jensen lost profits as a result of traffic accidents, that it rejected new business offers, and its net worth in 2007 was the same as it was in 2004. Little admitted he made multi-year loss projections without doing complete audit procedures. He conceded Jensen did not have a guaranteed multi-year ADM contract because it was terminable on 30 days' notice. From our review of the record, we conclude the trial court committed no error.

C. Prejudging the Case

Jensen contends the trial court erred by not excusing juror S.T. It notes that another juror claimed that before the case was submitted to the jury, juror S.T. told her that he had formed an opinion about who should prevail.

"For a juror to prejudge the case is serious misconduct." (*Clemens v. Regents of University of California* (1971) 20 Cal.App.3d 356, 361.) But whether such conduct took place involves a factual determination.

After the trial court learned of this accusation, it called S.T. to testify. S.T. told the court that he did not remember saying that he had prejudged the case. He said he would follow the court's instructions and would consider the views of other jurors during deliberations. The court found no cause to excuse him. This juror's credibility was a matter for the trial judge. Jensen has not shown an abuse of discretion.

II. *Instructing the Jury about Tracy Thomas being a Corporate Managing Agent*

Jensen contends the trial court erred by not instructing the jury that Tracy Thomas was a Jensen corporate managing agent for the breach of the duty of loyalty cause of action. It argues that Tracy's answer to a request for admission conclusively

conceded her status as a managing agent and the matter should never have been decided by the jury. We disagree.

The court prepared a special verdict form for the jury. On the breach of the duty of loyalty cause of action, the jury was asked: "1. Were either of the following Defendants a corporate officer, director or managing agent of Plaintiff Jensen Trucking Service? [¶] Mike Thomas __Yes ___No [¶] Tracy Thomas ___Yes ___No [¶] If your answer to question 1 is yes as to either Defendant, then answer question 2 as to such defendant(s). . . . [¶] 2. Did either of the following Defendants breach their duty of loyalty in connection with their formation of BOLT? [¶] Mike Thomas __Yes ___No [¶] Tracy Thomas __Yes ___No." As to Tracy Thomas, the jury answered "no" to questions 1 and 2.

In an answer to a request for admission, Tracy Thomas admitted that "while employed by [Jensen] the THOMASES owed a duty of loyalty to [Jensen]."

Jensen argues that by her admission that she owed a duty of loyalty, she impliedly admitted that she was a managing agent. It notes that managing agents owe a duty of loyalty to their employer. The Thomases respond that Jensen's position is flawed in two ways: 1) Tracy Thomas never admitted that she was a managing agent, therefore, this factual issue was properly before the jury; and 2) Jensen's argument is based on the false assumption that *only* managing agents owe a duty of loyalty to the employer. The Thomases are correct.

The request for admission only asked whether Tracy Thomas had a duty of loyalty. Jensen did not ask her to admit a particular employment status or to admit she owed a duty of loyalty *as a managing agent*. Directors, officers and managing agents of corporations, because of their special access to confidential information and participation in decision-making, owe a very high duty of loyalty to their employer. (*Safeway Stores v. Retail Clerks etc. Assn.* (1953) 41 Cal.2d 567, 575.) But non-management employees also owe a duty of loyalty. (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 410-411.) Consequently, when an employer asks any of its employees whether they owe a duty of loyalty, management and non-management employees usually would say "yes."

Tracy's affirmative answer was not an admission that she was a managing agent. From her testimony the jury could reasonably infer that she lacked the independent authority to be a managing agent. (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566-567, 577.) She acted under the direction of Mike Thomas and did not even have the power to hire or fire. (*Ibid.*)

Moreover, to prevail on a cause of action for breach of the duty of loyalty, Jensen had to prove that the alleged breach caused damages. (*Huong Que, Inc. v. Luu, supra*, 150 Cal.App.4th at p. 410.) Here the jury answered "no" to the question, "Was any Defendant(s) conduct a substantial factor in causing harm?" Jensen has not shown error.

III. *Evidence on Causation*

Jensen contends that there was no evidence to support the jury's finding that the Thomases were not a substantial factor in causing damages to Jensen. We disagree.

In deciding whether a verdict is supported by the evidence, we do not weigh the evidence or decide the credibility of witnesses. "When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) "We presume the evidence supports every finding of fact unless appellant demonstrates otherwise, and we must draw all reasonable inferences from the record to support the judgment." (*El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1357.)

Here Jensen had the burden to prove that the Thomases caused damages by showing "some substantial link" between their acts and the injury. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 778.) Jensen claims its witnesses established this link. But the jury could find that both Little's and Hobbs' credibility were impeached on cross-examination and factors other than the Thomases' conduct caused financial losses to Jensen. From Hobbs' testimony it could find that expenditures caused by traffic accidents and Jensen's discretionary business decisions were substantial factors leading to its loss of profits. Jensen's revenue depended on obtaining transportation business. Hobbs

testified that Jensen rejected offers for transportation business from several companies for discretionary business reasons.

But a trier of fact could find that those reasons were not credible, that Jensen had lowered its own income potential by rejecting this business, and its financial evidence was not persuasive. Jensen claims the Thomases substantially damaged the company, but Hobbs conceded that Jensen had not lost any net worth between 2004 and 2007. Jensen argues that it lost its long-term ADM Phoenix account. But Little admitted this contract was terminable on 30 days' notice. From this one could infer that ADM changed companies for that route for its own proper business reasons. In denying the motion for new trial, the trial court said Jensen's case was weak. It added, "The jury finding that defendant's conduct was not a substantial factor in causing [Jensen's] harm *is* a reasonable conclusion deducible from the evidence." We agree.

IV. *Evidence of Intent to Interfere with the Jensen-ADM Economic Relationship*

Jensen contends this evidence does not sustain the jury finding there was no intent by the Thomases to interfere with Jensen's economic relationship with ADM. But Jensen has not summarized the evidence supporting the Thomases' position. "[O]ne contending the evidence does not support some particular issue of fact must set forth in his brief *all* the material evidence bearing upon that issue and not merely the evidence favorable to him; failure to so state the evidence shall be deemed a waiver of the claimed error." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co., Inc.* (1977) 66 Cal.App.3d 101, 152.) But, even on the merits, the result is the same.

Jensen claims the evidence about Mike Thomas's actions in establishing BOLT show his intent to interfere with Jensen's economic relationship with ADM. The Thomases respond that ADM never severed that economic relationship and ADM opened the Phoenix route to fair competition. The parties draw different inferences from the trial testimony. But the issue is not the strength of the evidence supporting each party's position, it is only whether substantial evidence supports the judgment.

Jensen suggests Mike Thomas's testimony was impeached. But his credibility was a matter for the jury. Jensen has not shown why jurors could not draw

inferences from it which support the verdict. But, even so, there was other evidence. From Kuznia's and Reimer's testimony the jury could reasonably infer that the Thomases acted in good faith and were only interested in any available routes ADM would assign to them. The Thomases never made any negative statements to ADM about Jensen and did not request that they be given any particular route. ADM decided the transportation area they would be assigned. A reasonable inference is that ADM wanted to replace Jensen with BOLT, or another company which could meet the diversity requirement, and that the Thomases had no intent to interfere with Jensen's relationship with ADM. In addition to intent, to prevail, Jensen had to prove causation and damages. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) But in light of Kuznia's and Reimer's testimony, there is no reasonable likelihood that the result would change.

V. *Defense Counsel Misconduct*

Jensen contends that the Thomases' counsel committed misconduct at trial. It claims he made statements and introduced evidence to encourage jurors to have sympathy for the Thomases and their financial plight and to evoke a bias against Jensen.

But Jensen did not object at trial to many of the statements and much of the evidence that it now claims should have been excluded. '"[A] claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished.'" (*Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1649.)

Jensen raised the issue of defense counsel misconduct in its motion for new trial. The trial court found Jensen's objections to be tardy. It said defense counsel had made some "gratuitous" and "irrelevant" remarks. But the court issued admonishments sua sponte, gave curative instructions to the jury, and determined that counsel's conduct was not prejudicial. Jensen opened the door to the introduction of some of the evidence about the Thomases' financial condition by its questioning of Tracy Thomas. Jensen's counsel also asked the jury to consider the Thomases' financial condition. Jensen has not shown that the trial court's curative instructions were insufficient.

Jensen apparently concedes that defense counsel's conduct, by itself, does not warrant a reversal. It says it includes this issue to bolster its claim that the jury committed misconduct. But we have already concluded that Jensen's jury misconduct claim is not meritorious.

We have reviewed Jensen's remaining contentions and conclude that it has not shown reversible error.

The judgment is affirmed. Costs on appeal are awarded in favor of respondents.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Charles S. Crandall, Judge

Superior Court County of San Luis Obispo

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